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No. 01-1094

Supreme Court, U.S.
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In The Supreme Court of the United States

WILLIAM CAPACCHIONE, MICHAEL GRANT, et al.,
Petitioners,

v.

TERRY BELK, et al.,
and
THE CHARLOTTE-MECKLENBERG BOARD OF EDUCATION, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY IN SUPPORT OF GRANTING A 'TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **Whether a declaratory judgment of unitary status, which involuntarily terminated the Respondents' race-based student assignment plan, confers prevailing party status on Petitioners?**

2. **Whether prevailing party status in a desegregation case requires an injunction or a finding of a violation of individual rights?**

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REASONS IN REPLY FOR GRANTING THE WRIT

I. Respondents Have Not Disputed the Fact Petitioners Obtained a Declaratory Judgment of Unitary Status Which Involuntarily Altered Their Conduct

It is clear that Petitioners obtained a declaratory judgment which involuntarily altered the school district's conduct in every material aspect of the school system's operation, terminated the desegregation process, and returned local control to the school board. *See generally, Green v. County Sch. Bd. of New Kent Co.*, 391 U.S. 430 (1968). Undeniably, Petitioners obtained a judgment, affirmed on appeal, that involuntarily forced Respondents (hereinafter CMS) to "operate the school system without the strictures of those decrees . . . ." (4a). CMS does not dispute any of this in their brief. Given the magnitude of these concessions, it is not surprising that CMS seeks to change the subject by arguing that prevailing party status turns on the constitutionality of the racial quotas used in the magnet school program rather than the more sweeping change affected by the declaration of unitary status. (Brief in Opposition p. 17).

Under established Supreme Court precedent, Petitioners are prevailing parties no matter how the magnet school issue is viewed. CMS stopped using race in student assignment because they lost the case. CMS admits that, to comply with the unitary status judgment, it had no choice but to implement "a race neutral student assignment plan." (Brief in Opposition p. 13). That entitles Petitioners to fees since "in a declaratory judgment action . . ." a party prevails if the opposing party "alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit . . . ." *Hewitt v. Helms*, 482 U.S. 755, 761, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987). *See also, Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988), *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992).

The thrust of CMS's position is that Petitioners aren't prevailing parties because they did not obtain an injunction in the form of a "judgment" specifically prohibiting race-based student assignment. This is a perplexing *non-sequitur*. It simply does not follow that, because Petitioners did not

obtain an injunction prohibiting continued race-based student assignment, they did not secure a judgment involuntarily requiring CMS to terminate the existing race-based student assignment plan which CMS fought hard to retain.

CMS's argument that Petitioners did not prevail because they did not obtain a prospective injunction cannot be reconciled with binding precedent. Petitioners do not argue, and the law does not require, a prevailing party to obtain a prospective injunction. Rather, Petitioners are prevailing parties by virtue of the judgment declaring CMS unitary and directing CMS "to operate the school system without the strictures of these decrees no later than the 2002-2003 school year." (4a). CMS concedes that the courts below "vacated the Swann orders and returned CMS to local control," and directed the School Board to operate the school system "without the strictures of these decrees." (Brief in Opposition, p. 13 quoting (4a)). In other words, CMS admits it was ordered to terminate all existing race-based student assignment plans, and that it intends to comply with that judgment by implementing a race-neutral student assignment plan. Based on these uncontroverted facts, Petitioners are prevailing parties because they obtained "an enforceable judgment against the defendant . . ." that "directly benefit[ed] . . ." Petitioners by returning the school district to local control and freeing the Petitioners minor children from the past practice of having their skin color impact and often determine their school assignment. *Farrar*, 506 U.S. at 111.

CMS falsely portrays the constitutionality of the magnet school quotas during federal supervision as the issue on which fee entitlement turns. This is a diversionary tactic. Approximately one day of trial testimony was devoted to the magnet school issue while nearly two months was devoted to the numerous unitary status issues (14a, 186a). To view the magnet school issues as dominant over unitary status in this case is to argue that one day overshadowed fifty-nine. Petitioners want the Court to believe Respondents were declared prevailing parties in the district court by virtue of the finding that the magnet school racial quotas were

unconstitutional (Brief in Opposition, p. 17). But, the District Court did not do any such thing. It explicitly stated that "[i]n the present case, the Plaintiff-Intervenors prevailed after taking the extraordinary burden of proving that CMS had achieved unitary status." (285a). The district court made no mention of magnet school issues in connection with its holding that Petitioners were prevailing parties. They were awarded prevailing party status for securing a declaratory judgment of unitary status in the 42 U.S.C. § 1983 *Swann* case (284a - 286a).

In its brief, CMS repeats the error of the 6-5 'no fees' majority by claiming that the absence of a constitutional violation means a plaintiff-intervenor can never qualify as a prevailing party under § 1988. Yet, CMS effectively conceded the issue in the Fourth Circuit because it never briefed the unitary status prevailing party question in the court of appeals before the *en banc* court rendered its decision. (Opposition Brief p. 8). Judge Traxler correctly found in his dissent that "CMS has conceded that if we upheld the declaration of unitary status, Grant would be entitled to attorney fees." (63a).

Remarkably, CMS tries to find a way around its own concession by contending that it was Petitioners who raised the issue by filing a Petition for Rehearing and Rehearing En Banc. (Brief in Opposition p. 10). CMS never argued in any court that the Grant Petitioners would not be prevailing parties if the unitary status declaration was affirmed. Indeed, the bizarre notion that Petitioners could win the trial and be denied fees never occurred to anyone until the 2 to 1 vacated panel decision manufactured it without the issue ever being briefed.

Neither CMS nor the 6-5 'no fees' majority opinion cited any case that held prevailing party status under § 1988 was not merited by a declaration of unitary status achieved in an adversarial proceeding. It is unprecedented to suggest fees depend on, and in fact require a supplemental finding that CMS was "guilty" of a "violation" of Petitioners' rights. In a declaratory judgment action, a plaintiff is a prevailing party

so long as it obtains a declaration that "alters [the defendant's] conduct . . . towards the plaintiff that was the basis for the suit . . . ." *Hewitt*, 982 U.S. at 761; *Rhodes*, 488 U.S. at 4. There is no additional requirement of a "violation" under this Court's precedents. Remarkably, *Hewitt* and *Rhodes* are neither cited nor discussed by CMS in its opposition brief.

A fundamental flaw in the "no violations" argument advanced in the 6-5 'no fees' majority opinion is a misunderstanding of the nature of declaratory judgments. By design, "the essential distinction between a declaratory judgment action and an action seeking other relief is that in the former no actual wrong need have been committed or loss have occurred in order to sustain the action." *Horne v. Fireman's Retirement System of St. Louis*, 69 F.3d 233, 236 (8th Cir. 1995), *quoting*, *United States v. Fisher-Otis Co., Inc.*, 496 F.2d 1146, 1151 (10th Cir. 1974). Under the rationale advanced by CMS and the 6-5 no fees majority, in the absence of some "violation" of a litigant's rights, there can be no declaratory relief warranting prevailing party status under § 1988. But no case so holds because that would be tantamount to writing declaratory judgments out of § 1988.

The notion that a constitutional "violation" is a precondition to prevailing party status is directly contrary to binding precedent in this court which does not require any per se constitutional violation, but instead shifts fees whenever a "judgment . . ." affects the behavior of the defendant "toward the plaintiff." *Rhodes*, 488 U.S. at 4. More explicitly, this court has said that a declaratory judgment coupled with the "cessation of action by the defendant that the judgment produces. . ." such as "the termination of some conduct" qualifies a plaintiff as a prevailing party. *Hewitt*, 482 U.S. at 761. Undeniably, CMS has been declared unitary and ordered to terminate all race-based student assignments formerly justified by the desegregation decree. It has complied with this order by implementing a race-neutral assignment plan. Petitioners are, by that definition, prevailing parties.

CMS makes one feeble attempt to contest the fact that obtaining a declaration of unitary status qualifies Petitioners as prevailing parties. CMS contends Petitioners can't get fees because they were actually defendants in *Swann*. The record easily disposes of this specious claim. The district court specifically permitted Petitioners to intervene as "Plaintiff-Intervenors" (199a). CMS never challenged Petitioners rightful role as plaintiff intervenors. Petitioners were assigned the burden of proof on all unitary status issues (205a). It was CMS and the Swann Plaintiffs who played the role of defendants seeking to preserve the thirty year status quo of racial quotas, forced bussing, and racially gerrymandered student assignment zones; not Petitioners.

II. Review is Needed to Resolve the Circuit Split Created by the Fourth Circuit's Unprecedented Denial of Fees to a Prevailing Party

The Fourth Circuit's 6-5 'no fees' decision conflicts with this Court's and those of other circuits' cases regarding the requirements for prevailing party status under 42 U.S.C. § 1988. CMS fails to mention, much less distinguish, multiple circuit cases which hold that plaintiff-intervenors in school desegregation cases particularly, and civil rights cases generally, are entitled to prevailing party status under § 1988 even where they obtain less than a declaration of unitary status. *See, Wilder v. Bernstein*, 965 F.2d 1196, 1204 (2d Cir. 1992) (*en banc*) *cert. den., Administrator, N.Y. City Dept. of Human Resources v. Abbott House*, 506 U.S. 954 (1992); *United States v. Board of Educ. of Waterbury*, 605 F.2d 573, 576 (2d Cir. 1979); *Grove v. Mead School District No. 354*, 753 F.2d 1528, 1553 (9th Cir. 1985) *cert. den.*, 474 U.S. 826 (1985); *Miller v. Staats*, 706 F.2d 336, 340-47 (D.C. Cir. 1983) and *Donnell v. United States*, 682 F.2d 240, 246 (D.C. Cir. 1982) *cert. den.*, 459 U.S. 1204 (1983).

The Second Circuit case of *United States v. Bd. Of Ed. Of Waterbury, supra*, which CMS dismisses in a footnote, is on point. (Brief in Opposition, p. 23 nt 12). There, "an

organization of Puerto Rican parents and community leaders," was allowed to intervene in the ongoing school desegregation case "for the limited purpose of protecting the interests of the Hispanic community and participating in the development of remedial measures under the consent decree." *Waterbury*, 605 F.2d at 574. As in this case, the intervenors in *Waterbury*, not the original plaintiff "pulled the laboring oar." *Id.* While the intervenors' rights were never actually violated, and they never obtained a judgment, they did block the implementation of a race-based assignment plan called "remedial Plan H." *Id.* at 574-576. Unlike Petitioners, they did not "prevail [ ] on the merits . . ." and they did not force implementation of a new student assignment plan. *Id.* The Second Circuit, in a later decision, confirmed that the *Waterbury* intervenors were "not the school children whose civil rights were implicated in the underlying school desegregation case . . . ." *Wilder*, 965 F.2d at 1204. Rather, the *Waterbury* intervenors simply "obtained benefits for the class they represented . . .". While they failed to secure a judgment, and merely helped shape rather than dictate with an injunction the ultimate student assignment plan adopted, the Second Circuit nonetheless held the intervenors came "within the meaning of the term 'prevailing party'." *Id.* at 576-577.

Like *Waterbury's* intervenors, Petitioners were intervenors with interests adverse to the school board. They advocated the rights of their children and all children in the school system to be free of a cynically maintained and no longer constitutionally justifiable race-conscious student assignment plan which the 7-4 'unitary status' majority of the Fourth Circuit found CMS was "clinging to . . ." as "mechanisms for the attainment of different goals" than desegregation (40a). Petitioners took on the daunting burden of proving unitary status where the original plaintiffs and the school system opposed the end of federal supervision. But Petitioners did far more than the intervenors in *Waterbury*. They obtained a judgment that required CMS to entirely

abandon the race-based student assignment plan and adopt race neutral student assignment policies. Yet, contrary to the Second Circuit, the Fourth Circuit found Petitioners were not prevailing parties despite having obtained the ultimate relief in a desegregation case. Therefore, it is clear the Fourth Circuit's 6-5 'no fee' majority decision in *Swann* directly contradicts the Second Circuit's decision in *Waterbury*.

CMS dismisses the remaining cases cited by Petitioners to establish a circuit split on the prevailing party issue by contending they do not involve school desegregation cases. (CMS Brief in Opposition, p. 21). CMS does not explain how this distinction is relevant under § 1988. Clearly, the determination of prevailing party status does not turn upon the type of case in which fees are sought.

In *Miller v. Staats, supra*, the District of Columbia Circuit expressly rejected a standard that required plaintiff intervenors to "show facts proving defendants 'guilty, to some degree, of discrimination,' to establish their 'prevailing party' status." *Miller*, 706 F.2d at 342. There, the Smith plaintiff intervenors were reverse discrimination claimants who entered into a consent decree with the General Services Administration [GAO] in parallel litigation that was rivaled and potentially contradicted by another consent decree negotiated with the GAO by the *Miller* minority and women plaintiffs in a separate case. *Id.* at 338-339. Because the Smith plaintiff intervenors had not been injured by the proposed rival consent decree, the district court in *Miller* denied the Smith plaintiff intervenors prevailing party status "because they had not proved 'any sufficient threshold showing of real discrimination. . . ." *Id.* at 342. The District of Columbia Circuit rejected this standard and expressly held that prevailing party status for intervenors does not require a finding of a "violation" or "discrimination" *Id.*

The Fourth Circuit's 6-5 'no fee' majority decision explicitly contradicts the *Miller* holding by stating that an award of attorney's fees under § 1988 requires proof that intervenors "suffered deprivations of rights under federal civil rights laws or the Constitution." (140a). In contrast, the

Miller intervenors did not have to prove a violation of their rights to qualify as prevailing parties. Since the Fourth Circuit believed the Petitioners "have suffered no such deprivations . . ." it concluded "they are not entitled to statutory attorney's fees." *Id.* Clearly, the Fourth Circuit's ruling in this case contradicts the District of Columbia Circuit in *Miller*.

CMS also attempts to distinguish the cases cited by Petitioners on the ground that none "addressed a claim for attorney's fees premised on obtaining a unitary status determination" (Brief in Opposition, p. 22). If anything, this distinction strengthens Petitioner's arguments. In all of these cases, the plaintiffs obtained something less than unitary status but were awarded fees. Ironically, in *Jenkins v. Missouri*, 127 F.3d 709 (8th Cir. 1997) the plaintiff succeeded only in avoiding a declaration of unitary status. *Id.* at 715. Yet, fees were awarded, even though the ultimate benefit of unitary status was not obtained, because they preserved the desegregation order. It would be bizarre to differentiate between these two results, one Plaintiff rewarded with fees when unitary status was denied and another denied fees when a unitary status declaration was granted over the objection of the school board.[1]

The Second, Sixth, Eighth and Eleventh Circuits all agree that achieving some relief in a school desegregation case qualifies that party for prevailing party status. The Fourth

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[1]In the remaining cases, parties were awarded attorney's fees for post judgment monitoring which falls far short of the ultimate goal of unitary status. *See Mills v. Freeman*, 118 F.3d 727 (11th Cir. 1997); *Gaines v. Dougherty County Bd. of Ed.*, 775 F.2d 1565 (11th Cir. 1985) and *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979). Yet, even through these plaintiffs obtained something less than unitary status, they were held to be prevailing parties. By contrast, Petitioners achieved the ultimate goal of unitary status and were held by the Fourth Circuit to have failed to achieved prevailing party status.

Circuit's 6-5 'no fees' majority contradicts this widely held position by holding that achieving the ultimate end of school desegregation cases does not qualify one as a prevailing party under § 1988.

III. This Case is One of National Importance Because of the Incentive it Creates for School Districts to Prolong Federal Supervision

Numerous school districts still under desegregation orders are keenly watching this case. They are watching to see whether the 6-5 'no fees' decision will be left alone thereby allowing them to avoid seeking a declaration of unitary status and use the desegregation orders "for the attainment of different goals" like diversity (40a) without exposing them to fee liability.

CMS makes the claim that this is a unique case based upon a set of facts that won't recur. This is a ludicrous position. The issue of whether racial diversity can be a compelling governmental interest in education, and the constitutional implications of race-based student assignment and admissions is one of the significant legal issues of our day. CMS led the charge to oppose unitary status for the same reasons that have caused many other school systems to delay their request for unitary status. This was not a "dilemma," as CMS would posture it, between the competing demands of racial antagonists. It was CMS's calculated manipulation of the desegregation orders. CMS spent millions of dollars on attorneys and expert witnesses to oppose unitary status. It concealed witnesses in bad faith to oppose unitary status which was unanimously held to be sanctionable (61a-62a). CMS could have maintained neutrality in this case. But, CMS chose to desperately cling to the desegregation orders to the point of taking the "bizarre posture . . ." in this case that it had actually "failed" after thirty years of good faith compliance in maintaining a well desegregated school system (186a). CMS cynically sought to avoid unitary status in this case even though a prior superintendent concluded it achieved unitary status in the early 1990's (38a). CMS deliberately chose to avoid unitary status for nearly ten years

because it used court orders to achieve goals other than remediating past discrimination.

Given that this Court has held that race-based governmental action is contrary to the racial neutrality principle of the Fourteenth Amendment, the incentive for school systems like CMS to fight to remain under court order is powerful. *See, Miller v. Johnson*, 515 U.S.900, 904 (1995). As the law now stands, school systems like CMS and other school systems that wish to perpetuate race-based student assignments must preserve court orders to do so. Otherwise, there is no compelling state interest to racially assign children to schools. As this Court said in this case, absent a constitutional violation there would be no basis for "assignments of students on the basis of race." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971).

If the 6-5 'no fees' majority opinion is allowed to stand, there will be no incentive for other parents to retain counsel to challenge similarly manipulative school systems who make the same calculation that CMS made about using old desegregation orders as "cover" for student assignment plans aimed at achieving diversity rather than desegregation. This Court's statements that school desegregation remedies are designed to be temporary will become aspirational, at best. School systems should seek a return of local control as soon as the vestiges of past discrimination have been eradicated. If this Court does not correct the Fourth Circuit's error, school systems, not the law, will dictate if and when desegregation orders end.

CONCLUSION

For the above stated reasons, the Petitioners respectfully request that the Court grant their Petition for a Writ of Certiorari.

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